United States Court of Appeals,
Ninth Circuit.

SAFE AIR FOR EVERYONE, Plaintiff-Appellant,
v.

WAYNE MEYER, et al., Defendants-Appellees

No. 02-35751.
Argued and Submitted Nov. 4, 2003.
Filed July 1, 2004.

Joel M. Gross, Arnold & Porter, Washington, D.C., for the plaintiff-appellant.

Gary H. Baise, Baise & Miller, Washington, D.C., for the defendants-appellees.

Jon M. Bauman, Elam & Burke P.A., Boise, ID, for amicus curiae American Lung Association of Idaho/Nevada.

Karl T. Klein, Givens Pursley LLP, Boise, ID, for amicus curiae Idaho Medical Association, Inc.

Appeal from the United States District Court for the District of Idaho; Edward J. Lodge, District Judge, Presiding. D.C. No. CV-02-00241-EJL.

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

GOULD, Circuit Judge:

We consider whether grass residue remaining after a Kentucky bluegrass harvest is "solid waste" within the meaning of the Resource Conservation and Recovery Act ("RCRA"). Safe Air for Everyone ("Safe Air") appeals the district court's dismissal of its complaint for injunctive relief under RCRA. We conclude that the district court erred in dismissing the

case on jurisdictional grounds. However, because we determine that Safe Air has failed to demonstrate that a genuine issue of material fact exists as to whether grass residue is "solid waste" under RCRA, we affirm the judgment of the district court.

I.

In Idaho, Kentucky bluegrass is typically planted in the spring but does not flower and produce seed until the summer of the following year. By the time the flowers have produced seed, the bluegrass plants are fifteen to thirty-six inches tall. To harvest bluegrass seed, farmers first cut the crop close to the ground to prepare the crop for combining (i.e., separating the seed from the crop). A "curing" process dries out and ripens the head of the crop. After the curing process is complete, a combine separates the seed from the straw, leaving the straw on the field. The seed is prepared for commercial distribution. However, straw and stubble (the part of the crop not cut from the ground) remain in the field. Bluegrass farmers burn these remnants, a practice called "open field burning" or "open burning." Bluegrass farmers can repeat this process for several years, depending on the length of the productive life of each bluegrass field.

Safe Air is a non-profit corporation formed by individuals from northern Idaho, Washington, and Montana. One of Safe Air's objectives is to stop the practice of open burning. Safe Air asserts that smoke resulting from open burning endangers the public because it contains high concentrations of pollutants that create severe respiratory problems for residents in areas immediately surrounding bluegrass farms. Defendants-Appellees ("the Growers") are a group of 75 individuals and corporations that plant and harvest Kentucky bluegrass seed commercially in Idaho. All of the

Growers engage in open burning in the process of growing Kentucky bluegrass.

Safe Air filed a complaint in the United States District Court for the District of Idaho on May 31, 2002, alleging that the Growers, by engaging in open burning, violated the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a)(1)(B).[1] Safe Air also sought a preliminary injunction enjoining the Growers from engaging in open burning. The Growers filed a response in opposition to Safe Air's motion for preliminary injunction, and also filed a motion to dismiss the complaint on the basis of lack of subject matter jurisdiction.

On July 10-12, 2002, the district court held an evidentiary hearing on Safe Air's request for preliminary injunction at which the testimony of twenty-three witnesses was given subject to cross examination. On July 19, 2002, the district court dismissed Safe Air's complaint, concluding that it was without jurisdiction to resolve Safe Air's RCRA claim because, *inter alia*, grass residue did not constitute "solid waste" under RCRA.[2]

Safe Air appeals. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

---

[1] This provision permits an individual to file suit:

against ... any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B).

[2] The district court also dismissed Safe Air's federal common law nuisance claim. That claim is not presented to us on appeal.

II.

We first address the unusual procedural posture of the case. The Growers filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12. The district court construed the Growers' motion to dismiss as proceeding under Rules 12(b)(1) and 12(b)(6), and granted the Growers' motion under Rule 12(b)(1).

Safe Air argues that the district court erred in dismissing its complaint because: (1) the district court reviewed evidence outside the complaint (i.e., evidence from the preliminary injunction hearing) without converting the motion to dismiss into a summary judgment motion under Rule 56; and (2) the district court erroneously construed as a jurisdictional issue the question of whether grass residue (i.e., the straw and stubble that remain on the Growers' fields after the bluegrass harvest) is "solid waste" under RCRA. We disagree with Safe Air on the first issue because the district court, in this context, was not obligated formally to convert the Growers' motion into a motion for summary judgment solely because it reviewed evidence outside the complaint. However, as to the second issue, we agree that, in the circumstances of this case, the district court erred by treating the issue of whether grass residue is solid waste under RCRA as a jurisdictional issue.

The district court dismissed Safe Air's claim for lack of subject matter jurisdiction under Rule 12(b)(1). A Rule 12(b)(1) jurisdictional attack may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000) (citation omitted). In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction. The Growers'

jurisdictional attack was factual because the Growers challenged Safe Air's contention that grass residue constitutes solid waste under RCRA. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n. 5 (11th Cir.2003) (jurisdictional challenge was a factual attack where it "relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings").

In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003) (citing *White*, 227 F.3d at 1242). The court need not presume the truthfulness of the plaintiff's allegations. *White*, 227 F.3d at 1242. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039 n. 2.

However, "[j]urisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)." *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 140 (9th Cir.1983). In *Bell*, the Supreme Court determined that jurisdictional dismissals are warranted "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." 327 U.S. at 682-83, 66 S.Ct. 773.

We have held that a "[j]urisdictional finding of genuinely disputed facts is inappropriate when 'the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to

the merits' of an action." *Sun Valley*, 711 F.2d at 139 (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)).[3] The question of jurisdiction and the merits of an action are intertwined where "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Id. See also Thornhill Publ'g Co. v. Gen. Tel. Co.*, 594 F.2d 730, 734 (9th Cir.1979) ("[W]hen a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.") (quotation omitted).

The district court erred in characterizing its dismissal of Safe Air's complaint under Rule 12(b)(1) because the jurisdictional issue and substantive issues in this case are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits. The Growers have not argued that Safe Air's federal claims are "immaterial," "made solely for the purpose of obtaining federal jurisdiction," or "wholly insubstantial and frivolous." *Bell*, 327 U.S. at 682-83, 66 S.Ct. 773. Whether Safe Air alleged a claim that comes within RCRA's reach goes to the merits of Safe Air's action. *Sun Valley*, 711 F.2d at 140 ("[t]he ability of [the plaintiff] to allege a claim that comes within the definitional reach of the [Petroleum Marketing Practices Act] is a matter that goes to the merits of the action.").

---

[3] Two of our sister circuits that have considered this issue are in accord. *See, e.g., Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir.2003) ("[w]e have cautioned, however, that the district court should only rely on Rule 12(b)(1) if the facts necessary to sustain jurisdiction *do not implicate the merits of plaintiff's cause of action.*") (internal quotation omitted); *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.1981) ("Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.").

Safe Air filed its claim under the "citizen suit" provision of RCRA, 42 U.S.C. § 6972(a)(1)(B), which permits suits:

> against any person ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment.

(emphasis added). Because this provision of RCRA "provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief," the question of jurisdiction and the merits of this action are intertwined. For this reason, we hold that the district court's characterization of its dismissal under Rule 12(b)(1) was error. *Sun Valley*, 711 F.2d at 139.

III.

For the reasons expressed above, we review the district court's order below not as a dismissal for lack of subject matter jurisdiction but rather as a grant of summary judgment on the merits for the Growers. *Great W. Bank & Trust v. Kotz*, 532 F.2d 1252, 1254 (9th Cir.1976) (per curiam) (reviewing the district court's dismissal for lack of jurisdiction as a grant of summary judgment where the district court's dismissal was based on its conclusion that the note in question was not a "security" within the Securities Exchange Act).[4] Thus we

[4] Viewed in this light, we will review the ruling de novo. *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003). Viewing the

review RCRA and its definition of "solid waste," interpretations of the statutory language in case law, and RCRA's legislative history to determine if Safe Air has demonstrated a genuine issue of material fact on the issue of whether grass residue is "solid waste" under RCRA.

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). "Congress' 'overriding concern' in enacting RCRA was to establish the framework for a national system to insure the safe management of hazardous waste." *Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1179 (D.C.Cir.1987). Congress also expressed concern over "the 'rising tide' in scrap, discarded, and waste materials" and "the need to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." *Id.* (quoting 42 U.S.C. § 6901(a)(2) and (a)(4)).

Safe Air filed this lawsuit under the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B). To prevail, Safe Air must establish that the Growers are contributing to the "handling, storage, treatment, transportation, or disposal of any *solid or hazardous waste* which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Safe Air does not allege that the grass residue in question is "hazardous waste." Therefore, the crux of the case turns on the issue of whether Kentucky bluegrass residue is "solid waste" within the meaning of RCRA.

---

evidence in the light most favorable to the nonmoving party, we determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Navajo Nation v. Norris*, 331 F.3d 1041, 1044 (9th Cir.2003). We do not weigh the evidence or determine the truth of the matter, but only determine whether a genuine issue of material fact exists for trial. *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir.1999) (en banc).

Faced with the duty to interpret this provision of RCRA, we follow established principles of statutory construction. "[C]anons of statutory construction help give meaning to a statute's words. We begin with the language of the statute." *The Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.2003) (en banc) (internal citations omitted). "[A]nother fundamental canon of construction provides that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Id.* (internal quotation marks omitted). We have also recently reiterated the principle that, "in construing a statute, courts generally give words not defined in a statute their 'ordinary or natural meaning.' " *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir.2004) (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994)). With these maxims in mind, we turn again to RCRA.

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations...." 42 U.S.C. § 6903(27) (emphasis added). RCRA itself does not define the term "discarded material." However, we note that the verb "discard" is defined by dictionary and usage as to "cast aside; reject; abandon; give up." 1 The New Shorter Oxford English Dictionary 684 (4th ed.1993). We consider the term "discard" in its ordinary meaning to decide whether Safe Air presented a genuine issue of material fact supporting its contention that the Kentucky bluegrass residue burnt by the Growers is "solid waste" under RCRA.

Our sister circuits have considered the scope of RCRA's definition of "solid waste," and their determinations are helpful to our analysis. The D.C. Circuit assessed the scope of RCRA's definition of "solid

waste" in American Mining Congress v. U.S. EPA, 824 F.2d 1177 (D.C.Cir.1987) (*AMC I*). In *AMC I,* an industry group of mining and oil refining companies challenged an Environmental Protection Agency ("EPA") rule amendment giving the EPA authority to regulate reused materials in the petroleum and mining industries. Noting that "EPA's jurisdiction is limited to those materials that constitute 'solid waste,' " *AMC I,* 824 F.2d at 1179, the D.C. Circuit held that "our analysis of [RCRA] reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. It reasoned, persuasively to us, that "[e]ncompassing materials retained for immediate reuse within the scope of 'discarded material' strains ... the everyday usage of that term."[5] *Id.* at 1184. Significant for our purposes, *AMC I* determined that materials have not contributed to a waste disposal problem where "*they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.*" *Id.* at 1186. The D.C. Circuit held that EPA contravened Congress's intent by attempting to regulate "in-process secondary materials." *Id.* at 1193.[6]

---

[5] The Second Circuit took a consistent approach, though reaching a different result on the facts, in Connecticut Coastal Fishermen's Assoc. v. Remington Arms Co., 989 F.2d 1305 (2d Cir.1993). In *Connecticut Coastal,* the materials at issue were 2400 tons of lead shot and eleven million pounds of clay target fragments located on land and waters surrounding a shooting club. The materials had accumulated after seventy years of operation of the shooting club. The court held, "[w]ithout deciding how long materials must accumulate before they become discarded ... we agree that the lead shot and clay targets in Long Island Sound have *accumulated long enough* to be considered solid waste." *Id.* at 1316 (emphasis added). Thus, the length of time the materials accumulated was important to determining whether the materials were solid waste.

[6] The D.C. Circuit revisited this issue in American Mining Cong. v. U.S. EPA, 907 F.2d 1179 (D.C.Cir.1990) (*AMC II*), when it held that sludge from wastewater that *may* at some time in the future be reclaimed constitutes "discarded" material under RCRA. *Id.* at 1186-87. The court determined that "[n]othing in [*AMC I*] prevents [EPA] from treating as 'discarded' the wastes at issue in this case, which are managed in land disposal units that *are* part of wastewater

The D.C. Circuit reached a similar conclusion in *Association of Battery Recyclers v. U.S. EPA*, 208 F.3d 1047 (D.C.Cir.2000). The issue in *Battery Recyclers* was whether materials generated and reclaimed within the mineral processing industry could be deemed "solid waste" under RCRA, such that it could be regulated by the EPA. The court held that "at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id.* at 1056.

The Eleventh Circuit addressed a variation of this issue in *United States v. ILCO*, 996 F.2d 1126 (11th Cir.1993). In *ILCO*, a lead smelting company ("Interstate Lead") producing ingots from lead plates of recycled automobile batteries challenged EPA's regulation of the plates.[7] Interstate Lead argued that, because it had never disposed of the lead plates, EPA could not regulate the lead plates as "discarded material" under 42 U.S.C. § 6903(27). The Eleventh Circuit disagreed, reasoning:

> The lead plates and groups are, no doubt, valuable feedstock for a smelting process. Nevertheless, EPA, with congressional authority, promulgated regulations that classify these materials as 'discarded solid waste.' *Somebody* has discarded the battery in which these components are found. This fact does not change just because a reclaimer has purchased or finds value in the components.

---

treatment systems, which *have* therefore become 'part of the waste disposal problem,' and which are *not* part of ongoing industrial processes." *Id.* at 1186.

[7] EPA regulated these materials under RCRA's "hazardous waste" subsection; however, as we have already discussed, hazardous waste under RCRA is a subset of "solid waste," and the definition of "solid waste" at issue in *ILCO* was the same as that before us.

Id. at 1131.[8]

Considering these extra-circuit cases to be persuasive in identifying relevant considerations bearing on whether grass residue is "solid waste" under RCRA, we will also evaluate: (1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself," *AMC I*, 824 F.2d at 1186; (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused, *AMC II*, 907 F.2d at 1186; (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer, *ILCO*, 996 F.2d at 1131.

We turn to the evidence submitted by the parties to the district court. The Growers presented evidence that they do not discard the grass residue, but rather reuse grass residue in a continuous process of growing Kentucky bluegrass. This reuse generates two primary benefits to the Growers: returning nutrients to bluegrass fields and facilitating the open burning process.

The Growers presented evidence at the preliminary injunction hearing showing that grass residue contains nutrients that are beneficial to bluegrass fields when returned to soil. Dr. Glen Murray, the Growers' expert on growing Kentucky blue-grass in the northern Idaho area, testified that grass residue contributes recycled nutrients and can act as a fertilizer to bluegrass fields. Karl Felgenhauer, a Washington bluegrass farmer, also testified that grass residue

---

[8] We recognize that the issue of monetary value does not affect the analysis of whether materials are "solid waste" under RCRA. As the Eleventh Circuit held in *ILCO*, the fact that discarded materials are "solid waste" under RCRA does not change "just because a reclaimer has purchased or finds value in the components." *Interstate Lead*, 996 F.2d at 1131. However, in this case the Growers do not base their argument on the assertion that grass residue has monetary value to *someone;* rather, the Growers argue that grass residue is not solid waste because they immediately reuse it to further successful bluegrass harvests.

contains such nutrients. Paul Stearns, another Washington bluegrass farmer, testified that grass residue remaining after a bluegrass harvest contains potash and can act as a fertilizer.

The Growers also presented evidence that grass residue is an integral component in the open burning process because grass residue carries fire efficiently across bluegrass fields. The grass residue's vital role in the open burning process is significant because the Growers submitted evidence establishing that open burning has four critical benefits for Kentucky bluegrass farmers.

First, several witnesses testified that open burning extends the productive life of bluegrass fields. Donald Jacklin, Safe Air's witness, testified that open burning in some cases increases the life of bluegrass fields up to twenty years. Asked about the value of open burning to bluegrass production, Jacklin testified that "nothing equals burning," and that open burning is an agricultural practice incorporated into the production, planting, and harvesting of bluegrass. Dr. Murray testified that a bluegrass field's seed production can be maintained longer with open burning. Felgenhauer, the Washington farmer, testified that he experienced a significant decrease in the life of his bluegrass fields after an open burning ban was instituted in Washington state.

Second, several witnesses testified that open burning restores beneficial minerals and fertilizers to bluegrass fields. Dr. Paul Meints, one of Safe Air's experts, testified that the value of burnt grass residue ash to bluegrass fields is "[p]rimarily the restoration of the phosphorus and potassium that is held within that tissue," and that burnt grass residue ash left on soil is beneficial to bluegrass fields because it provides nutrients. Defendant Wayne Meyer, an Idaho bluegrass farmer, testified that phosphorus and potash remain on bluegrass fields as a result of the burning process, and

that these elements act as a fertilizer to the fields. Stearns testified that farmers who engage in open burning need to purchase less supplemental potash because open burning releases potash onto the bluegrass field. Dr. Murray testified that nutrients are left in the ash of burnt residue.

Third, the Growers presented evidence suggesting that open field burning reduces or eliminates insects on bluegrass fields, reducing the need for pesticide use.[9] Schultheis testified that he had to use more pesticides, herbicides, and fungicides on his fields after he stopped open burning, and that open burning also reduces wheat infestation.[10] Meyer also testified that open burning controls weeds, insects, and disease.

Finally, Paul Stearns testified that open burning blackens the soil on bluegrass fields, which maximizes the soil's sunlight absorption to increase the crop yield for the following crop. Dr. Meints also testified that blackened soil absorbs heat and sun rays.

Safe Air does not contest that grass residue provides benefits for the Growers, but argues that the primary benefit to the Growers from open burning is removal of grass residue, and that other benefits of grass residue are incidental to the Growers' goal of removing the residue. Safe Air argues that the two most important benefits from open burning of grass residue, sunlight absorption and enhancing productive life of bluegrass fields, result from the removal of grass residue.[11] As to

---

[9] The Idaho legislature has made a similar finding that "the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations." Idaho Code § 22-4801.

[10] Wheat infestation tends to reduce the quality of a bluegrass harvest.

[11] Safe Air, for example, presented testimony of Jacklin, a bluegrass farmer, that "99.9%" of the reason why he engaged in burning was for the "photo induction enhancement" of seed yield, which he characterized as maximizing the sunlight exposure of new bluegrass plant tissue.

the other benefits (i.e., the fertilizer in the ash and reduced pesticide use), Safe Air argues that these are "incidental benefits that do not change the nature of what is transpiring from the discarding of waste."[12]

However, even when we view the evidence in the light most favorable to Safe Air, there is no dispute that the Growers realize farming benefits from reusing grass residue in the process of open burning. Safe Air did not present testimony challenging the Growers' contentions that: (1) grass residue offers nutrients to bluegrass fields; (2) burnt grass residue ash resulting from open burning helps fertilize bluegrass fields; (3) open burning reduces the incidence of weed, fungi, and insect infestation in bluegrass fields; and (4) open burning blackens bluegrass fields, which contributes to creating optimal conditions for the next bluegrass harvest. Safe Air dismisses these indisputable benefits as "incidental," but our view is necessarily controlled by RCRA's statutory language suggesting that materials must be "discarded" to be considered solid waste. Because there is undisputed evidence that the Growers reuse the grass residue in a continuous farming process effectively designed to produce Kentucky bluegrass, there is no genuine issue of material fact as to whether grass residue is "discarded material." It is not. The bluegrass residue is not discarded, abandoned, or given up, and it does not qualify as "solid waste" under RCRA, based on its statutory definition of "solid waste" as "discarded material."

Moreover, our evaluation of each of the factors noted by our sister circuits in analogous cases, discussed above, supports that grass residue beneficially reused by the Growers in producing Kentucky bluegrass is not

[12] For example, Dr. Meints testified that open burning does not "necessarily" reduce the need for use of pesticides, herbicides, and fungicides, although he conceded that he did not submit evidence in the record to support that conclusion. Dr. Meints also testified that much organic matter is burned during the open burning process, and that any organic matter that remains after open burning provides little benefit to soil.

"solid waste" under RCRA. The Growers presented uncontroverted evidence establishing that: (1) the grass residue is destined for beneficial reuse in a continuous process of growing and harvesting Kentucky bluegrass seeds, the generating industry, AMC I, 824 F.2d at 1186; (2) the Growers reuse grass residue, *inter alia*, to provide nutrients and to act as a fire accelerant for open burning, as opposed to being kept in storage for potential reuse, AMC II, 907 F.2d at 1186; and (3) the grass residue is being reused by farmers who are its original owners (the Growers), not by a salvager or reclaimer. ILCO, 996 F.2d at 1131. Under these standards, which we determine to have persuasive application here, there is no genuine issue of material fact as to whether grass residue is "discarded."

RCRA's legislative history also reinforces our conclusion that grass residue is not the type of material that Congress intended to proscribe under RCRA. The House Report reveals that RCRA was intended as "a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste." H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239. Congress was concerned with waste products of all types that were contributing to ever-increasing landfills:

> In addressing this problem, the Committee recognizes that Solid Waste, the traditional term for trash or refuse is inappropriate. The words solid waste are laden with false connotations. They are more narrow in meaning than the Committee's concern. The words discarded materials more accurately reflect the Committee's interest.

Not only solid wastes, but also liquid and contained gaseous wastes, semi-solid wastes and

sludges are the subjects of this legislation. Waste itself is a misleading word in the context of the committee's activity.... An increase in reclamation and reuse practices is a major objective of the Resource Conservation and Recovery Act.

Id. at 2-3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41.

In enacting RCRA, Congress also declared that agricultural products that could be recycled or reused as fertilizers were *not* its concern. The same House Report stated, "[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses.... Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." *Id.* at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41.

The burning of bluegrass residue by farmers is not the evil against which Congress took aim. To the contrary, the bluegrass residue is the type of agricultural remnant, used by farmers to add nutrients to soil, that Congress did not consider to be "discarded." H.R.Rep. No. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6239-41 ("[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses.... Agricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation.").

Safe Air's response to RCRA's legislative history is unpersuasive. Safe Air argues that because the House Report states that "*much* industrial and agricultural waste is reclaimed," "much" does not mean "all," and this leaves open the possibility that grass residue is solid waste. However, the possibility of such a distinction in theory does not persuade us that there is a genuine issue

of material fact as to whether blue-grass residue can properly be considered "solid waste" within RCRA's meaning.[13]

Given the uncontroverted evidence that the Growers reuse the grass residue in a continuous process for Kentucky bluegrass production, and do so in accord with farming practices that are beneficial in increasing crop yields, Safe Air has not demonstrated a genuine issue of material fact on the issue whether grass residue is a "solid waste" under RCRA.[14]

---

[13] Referring to the House Report's comment that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditions are not considered discarded materials in the sense of this legislation," Safe Air argues that "[i]f the Growers mulched their residue and returned it to the soil, this sentence might have applicability. But that is not what they do. They burn the residue...." This argument has some weight but is not dispositive. It is true that a part of the residue is returned to soil while a part that is smoke is carried off by air. Yet, for materials to be solid waste under RCRA, they must be "discarded." The determination of whether grass residue has been "discarded" is made independently of *how* the materials are handled. Despite the fact that a portion of residue becomes airborne smoke, the residue is not thereby automatically "discarded."

[14] The dissent makes four arguments to which we respond briefly.

First, the dissent argues that grass residue is "discarded material" under a dictionary definition and maintains that is dispositive. In our textual discussion we noted the dictionary meaning of "discard" as "cast aside; reject; abandon; give up," and we have fairly applied this definition. As we explain in our analysis, we conclude that grass residue is not "solid waste" under RCRA. Thus, while both this opinion and the dissent agree that we start with the statute's language, in our view the dissent goes astray with an incomplete analysis.

Second, the dissent contends that the out-of-circuit cases that we cite are inapplicable because they involve EPA regulations that have a narrower definition of "solid waste." This argument is without merit. Because these cases involve challenges to EPA's regulation of particular items, these cases necessarily address whether those items were within RCRA's statutory definition of "solid waste" as "discarded material," the same definition at issue here. *ILCO*, 996 F.2d at 1132 (rejecting challenge to EPA regulation because batteries were "discarded" under RCRA's general definition

We discern from Congress's explicit language in RCRA, focusing on discarded materials as a touchstone for solid waste, and from Congress's stated purposes, no Congressional declaration or intent to prohibit the established farming practice of open burning of Kentucky bluegrass residue. The benefits to the Growers of this practice were established beyond dispute in the evidence presented to the district court. Safe Air has not demonstrated that there is a genuine issue of material fact as to whether grass residue is "solid waste" under RCRA.[15] On the undisputed evidence, we conclude that Kentucky bluegrass residue is not a "solid waste," and that RCRA does not prohibit the Growers' general practice of open burning.[16]

---

of "solid waste"); *AMC I*, 824 F.2d at 1185 ("The question we face ... is whether ... Congress was using the term 'discarded' in its ordinary sense...."); *AMC II*, 907 F.2d at 1186 ("Nothing in *AMC* prevents [EPA] from treating as 'discarded' the wastes at issue in this case...."). These cases analyze the term "discarded," are persuasively contrary to the dissent's analysis, and are relevant to the issue before us which has never been decided by our circuit.

Third, the dissent argues that our holding permits any disposal process as long as the waste residue is eventually returned to soil. This is an incorrect overstatement. We only hold that, in these circumstances of Kentucky bluegrass farming, grass residue customarily used in the farming cycle is not "solid waste" under RCRA.

Finally, the dissent urges that a genuine issue of material fact exists as to the value of grass residue to the Growers. But as we explain in our textual discussion, the Growers introduced uncontested testimony, during an extensive evidentiary hearing in the district court, that grass residue has benefits to the Growers. The dissent does not point to any testimony contradicting this point that the district court found uncontested. It is not enough for Safe Air merely to argue that the uncontested benefits are ancillary.

[15] Having determined that grass residue is not "solid waste" under RCRA, we need not address whether the Growers' handling of the grass residue constitutes a "disposal," "treatment," or "handling" of solid waste. Nor do we address whether the Growers' practice of open burning constitutes an "imminent and substantial endangerment" under RCRA.

[16] Of course, any burning of bluegrass residue must comply with both the federal Clean Air Act, 42 U.S.C. § 7470 et seq., and with any applicable state regulation. As pertinent here, the lawsuit

AFFIRMED.

PAEZ, Circuit Judge, concurring in part, dissenting in part:

I concur in Part II of the majority opinion, in which the majority concluded that we should review the district court's dismissal for lack of jurisdiction as a grant of summary judgment on the merits for the Growers. I respectfully dissent, however, from Part III, which holds that Safe Air has not demonstrated that the post-harvest crop residue is a "solid waste" under RCRA. Because I disagree with the legal standard that the majority applies to determine whether the post-harvest crop residue has been "discarded," I would conclude instead that the Growers have discarded the post-harvest crop residue within the meaning of RCRA. Even if I were to agree with the majority's interpretation of the RCRA statute, I would nonetheless hold that there are genuine triable issues of fact. Accordingly, I would reverse the district court's judgment and remand for trial.

I.

Because RCRA does not define "discarded" we look to the "ordinary, contemporary, common meaning"

---

before us on appeal makes no claim under the Clean Air Act, and the record, so far as it addresses this issue, suggests that the Growers have complied with air quality standards set by federal and state regulators charged with enforcement of the Clean Air Act. In addition, Idaho has not outlawed generally the practice of burning Kentucky bluegrass residue, and the Growers' conduct is not alleged to violate Idaho state regulation of open burning as it affects air quality. *See generally* Idaho Code § 22-4801 (Michie 1995 & Supp.2002).

of that term.[1] *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.2003) (en banc) (internal quotation marks omitted). Thus, our ultimate task is to determine whether Safe Air has presented evidence that, if accepted as true, creates a genuine issue concerning whether the Growers have "drop [ped], dismiss[ed], let go, or g[o]t rid of as no longer useful, valuable or pleasurable" the post-harvest crop residue. *Webster's Third New International Dictionary* 644 (1993).

Considering the evidence presented to the district court, I have little difficulty concluding that Safe Air has presented sufficient evidence to show that the post-harvest crop residue was "discarded." In opposition to the Growers' motion to dismiss and in support of its motion for preliminary injunction, Safe Air presented the district court with testimony and affidavits from its members, individuals in the community and medical and agricultural experts. In this testimonial and documentary evidence, Safe Air established that it is necessary to remove the post-harvest residue in order to maintain seed yields. Indeed, Safe Air contended that "the primary purpose of burning the fields is to *remove* the excess post-harvest crop residue from the bluegrass fields."

In their motion to dismiss, the Growers did not dispute Safe Air's assertion that the post-harvest crop residue had to be removed from the fields. Although the Growers presented testimony and affidavits contending that they did not intend to discard the residue, they nonetheless admitted that the residue had to be removed from the fields in order to maintain seed production and to limit the insects and parasites that would otherwise find food and shelter in the residue.[2]

---

[1] As the majority recognizes, the question of whether the post-harvest crop residue constitutes "solid waste" under RCRA depends on the meaning of "otherwise discarded material." Thus, I primarily focus here on the definition of "discarded material."

[2] For example, Dr. Murray, an expert testifying on behalf of the Growers, admitted during his testimony at the preliminary injunction hearing that "the primary reason that Kentucky bluegrass

Because there is no dispute that the Growers burn the post-harvest crop residue to remove it from the fields, and because this act of removal is within the plain meaning of "discard," I would reverse the district court's judgment and remand for further proceedings.[3]

II.

It is well-established that "[w]here the plain meaning of a provision is unambiguous that meaning is controlling, except in the rare case [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters." *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir.1997) (internal quotation marks omitted). *See also United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' ") (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)). The majority's analysis, however, extends beyond the plain meaning of "discard" to evaluate those "relevant considerations," Maj. Op. at 1043, that it has gleaned from extra-circuit cases discussing the meaning of "discard" in distinctly different contexts. Because I do

---

farmers use fire is to remove the residue from the field." Similarly, Mr. Jacklin, a bluegrass farmer testifying on behalf of Safe Air, noted that "99.9 percent" of the reason for burning the fields is to remove the post-harvest crop residue to ensure that the light needed for bluegrass seed production could reach the bluegrass plants.

[3] Although there is no dispute that the post-harvest crop residue has been discarded, I would not hold that Safe Air is entitled to summary judgment in its favor because Safe Air must also prove that the Growers' burning constitutes an "imminent and substantial endangerment to the public health." 42 U.S.C. § 7002 et seq. The district court did not address this issue and it should do so in the first instance.

not believe that there is any need to look beyond the ordinary meaning of the term "discard" and the majority has not offered any convincing rationale for its extended analysis, I would only look to the ordinary meaning of "discard," and would conclude, as explained above, that the Growers discard the post-harvest crop residue.

Even if the majority could justify importing "relevant considerations" in determining the meaning of "discard," I would nonetheless reverse the district court's judgment in this case. I disagree that the extra-circuit cases--or indeed, the statute itself--support the majority's conclusion that mere beneficial reuse means that a substance has not been discarded under RCRA. Moreover, even were I to accept the majority's interpretation, I would conclude that a genuine issue of material fact exists as to whether the post-harvest crop residue is "destined for beneficial reuse in a continual process." Maj. Op. at 1045.

A.

The majority cites to RCRA's legislative history to support its conclusion that RCRA does not encompass the post-harvest residue at issue here. Because the plain and unambiguous definition of "discard" encompasses the post-harvest crop residue, the legislative history should be examined only to determine whether there is a "clearly expressed ... contrary legislative intent." *United States v. Fiorillo*, 186 F.3d 1136, 1146 (9th Cir.1999) (quotation marks omitted) (analyzing statutory provision of RCRA).

Far from revealing a "contrary" intent, the legislative history demonstrates that Congress intended solid waste to include "*any* ... discarded material resulting from ... agricultural operations...." 42 U.S.C. § 6903(27) (emphasis added).[4] The House Report indicates

[4] Indeed, where, as here, the statute is a remedial statute, enacted to protect the public health, we are most likely to satisfy

that Congress purposefully defined "solid waste" to include "discarded materials" to give RCRA a broader reach. *See* H.R.Rep. No. 94-1491, pt. I, at 2, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240, 6246.[5]

The majority makes much of the fact that the House Report excludes "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners...." H.R.Rep. No. 94-1491, pt. I, at 2, *reprinted in* 1976 U.S.C.C.A.N. at 6239; *but see* 40 C.F.R. § 261.4(b)(2) (indicating that residue from the "growing and harvesting of agricultural crops" which "are returned to the soils as fertilizers" are "[s]olid wastes which are not hazardous wastes."). But this statement does not indicate that Congress intended to exclude from the scope of RCRA agricultural waste that is first burned before being used as fertilizer.[6] According to the majority's logic, any disposal process, no matter how

---

Congress's purposes by construing the statute broadly. *See e.g., Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1481 (9th Cir.1995) (noting that the Comprehensive Environmental Response, Compensation and Liability Act was enacted to protect public health and, should thus be construed broadly); *United States v. Aceto Agr. Chem. Corp.*, 872 F.2d 1373, 1383 (8th Cir.1989) (recognizing that RCRA is a remedial statute that should be construed liberally).

[5] When RCRA was enacted, agricultural waste was the second largest source of waste in this country, producing 687 million tons per year. *See* H.R.Rep. No. 94-1491, pt. I, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6252-53. Congress enacted RCRA to regulate disposal methods, including burning, that created health and safety risks. *See id.* at 37-38, 90, *reprinted in* 1976 U.S.C.C.A.N. at 6275-77, 6325-26. Construing "solid waste" to include the post-harvest crop residue at issue here furthers Congress's intent to regulate the disposal of waste that could endanger public health.

[6] Although the majority states that "the determination of whether [the post-harvest crop] residue has been 'discarded' is made independently of *how* the materials are handled," the majority ignores the fact that the question of whether the post-harvest crop residue is "solid waste" is inextricable from the question of how those materials are handled. *See* 42 U.S.C. § 6903(27). Thus, the fact that the residue is burned, rather than mulched and returned to the soil, is relevant to whether the residue constitutes "solid waste" under RCRA.

environmentally unsound, would be exempted from the reach of RCRA as long as the waste residue was eventually returned to the soil. This could not have been Congress' intent, especially since Congress expressed a special concern with waste that was burned. *See* H.R.Rep. No. 94-1491, pt. I, at 37-38, 90, *reprinted in* 1976 U.S.C.C.A.N. at 6275-77, 6325-26; *see also id.* at 17-24, *reprinted in* 1976 U.S.C.C.A.N. at 6254-62 (listing improper disposal practices that resulted in harmful air pollution). *Cf. Am. Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1187 (D.C.Cir.1990) (*AMC II*) (concluding that, where the disposal or treatment process posed a danger to the public health, the material disposed of should be considered "discarded").

No statutory declaration or other Congressional statement of intent suggests that post-harvest residue that is burned should be excluded from RCRA's definition of "solid waste." Rather, the House Report reflects that RCRA specifically applies to disposal practices that result in air pollution:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove pollutatns [sic] from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H.R.Rep. No. 94-1491, Part I, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6241-42. Where, as here, the

residue is discarded and burned, the legislative history indicates that the disposal of such material is within the meaning of "solid waste" under RCRA.

B.

The majority also relies on extra-circuit cases to support its conclusion that the post-harvest crop residue is not "discarded." These cases, however, are inapplicable to the interpretation of "solid waste" at issue here. Most notably, those cases interpret the meaning of "solid waste" in considering the validity of hazardous waste regulations promulgated by the Environmental Protection Agency ("EPA").[7] *See* AMC I, 824 F.2d at 1178 (considering whether the EPA exceeded its regulatory authority by including "in process secondary materials" in its definition of solid waste); *American Mining Cong. v. U.S. EPA*, 907 F.2d 1179, 1181-82 (D.C.Cir.1990) (*AMC II*) (considering whether the EPA exceeded its regulatory authority in treating six wastes generated from metal smelting operations as "hazardous" waste); *United States v. ILCO, Inc.*, 996 F.2d 1126, 1130 (11th Cir.1993) (considering whether "lead parts, which have been reclaimed from spent car and truck batteries for recycling purposes, are exempt from[the EPA's] regulation under RCRA").

Although RCRA defines "solid waste" to cover all types of "discarded materials," *see* 42 U.S.C. § 6903(27), the EPA's RCRA regulations at issue in *AMC I, AMC II* and *ILCO* have a special definition of "solid waste," *see*

[7] Under RCRA, a "solid" waste is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material...." 42 U.S.C. § 6903(27). A "hazardous" waste, however, is a subset of "solid" waste which may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5).

40 C.F.R. § 261.2(a)(1), which "applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(1).[8] Thus, the regulatory definition considered in *AMC I*, *AMC II* and *ILCO* is significantly narrower than the statutory definition at issue here. Accordingly, I do not find these cases persuasive in our determination of whether the post-harvest crop residue has been "discarded."

C.

Even if I were to agree with the majority's conclusion that the extra-circuit cases constitute persuasive authority, Maj. Op. at 1043, I would nonetheless conclude that there is a genuine factual dispute as to whether the post-harvest crop residue has been discarded. I would therefore reverse the summary judgment in favor of the Growers.

Relying on the analysis in *AMC I*, *AMC II* and *ILCO*, the majority reasons that as long as the residue "provides benefits for the Growers," Maj. Op. at 1044, it has not been "discarded" under RCRA. This unnecessarily narrows the definition of "discarded material."

The cases do not support the majority's proposition that the mere recognition of some beneficial use negates the fact that materials have been "discarded" under RCRA. The cases cited by the majority distinguish between those materials extracted and immediately reused in an ongoing process and those materials discarded and only later put to beneficial use. *AMC I*

[8] Subtitle C of RCRA, 42 U.S.C. § § 6921-6939, requires the EPA to create a comprehensive regulatory scheme for the treatment, storage and disposal of hazardous wastes. Under this section, the EPA must "develop and promulgate criteria for identifying the characteristics of [those] 'solid' wastes that are also 'hazardous' wastes." 42 U.S.C. § 6921(a), (b).

merely held that materials extracted from primary metals that are recaptured and recycled as part of an ongoing industrial process are not "solid waste" under the EPA's regulatory definition of that term. That same court later clarified that *AMC I* 's "holding concerned only materials that are 'destined for *immediate reuse* in another phase of the industry's ongoing production process....' " *AMC II*, 907 F.2d at 1186 (quoting *AMC I*, 824 F.2d at 1185) (emphasis in original). The D.C. Circuit also rejected the claim that "potential reuse of a material prevents the [EPA] from classifying it as 'discarded.' " *Id.; see also ILCO*, 996 F.2d at 1132 (noting that "[p]reviously discarded solid waste, although it may at some point be recycled, nonetheless remains solid waste"); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 741 (D.C.Cir.1990) (holding that slag residue resulting from the production of steel was "discarded" even though zinc would later be recovered from the slag at a reclamation facility.).

Thus, even following the majority's analysis and drawing on the principles from the above cases, it still must be shown that the residue is "destined for *immediate reuse* in another phase of the industry's ongoing production process." *AMC II*, 907 F.2d at 1186 (emphasis in original). Relevant considerations may include such questions as the intent of the Growers in using the materials and the purpose of removing the residue, *see No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148 (2d Cir.2001) (insecticides are not "discarded" within the meaning of RCRA when they are sprayed into the air with the design of effecting their intended purpose of killing mosquitoes and their larvae); *Water Keeper Alliance v. United States Dep't of Defense*, 152 F.Supp.2d 163, 167-69 (D.P.R.) (holding that ordinances were not "discarded material" under RCRA as soon as they made contact with the land because, at that moment, at least, they were still serving their intended purpose), *aff'd* 271 F.3d 21 (1st Cir.2001); and the specific mechanics of the process, including, for example, the length of time the post-harvest crop

residue was left on the fields before the Growers burned it, *see* Conn. Coastal Fishermen's Ass'n. v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir.1993) (lead and clay shots were discarded because they had been "left to accumulate long after they[had] served their intended purpose").

Safe Air contends that the Growers' primary purpose in burning the residue is to remove it--that is, "burning blue-grass residue is primarily an inexpensive waste disposal practice." On the other hand, the Growers argue that they consider the post-harvest crop residue "important and valuable materials used in the agricultural process." There are thus decidedly different accounts of whether and how the post-harvest crop residue factors into the continuing growth process for Kentucky bluegrass.[9] Even if I were to agree with the

---

[9] The majority notes that Safe Air does not dispute that the post-harvest crop residue provides some benefits to the Growers. But, under the majority's approach, this is not the question that must be resolved in determining whether the residue has been "discarded." Rather, the key inquiry is whether the Growers reuse the post-harvest crop residue in a continuous process of producing seed. Although the majority states that the Growers produced "uncontroverted evidence that [they] reuse the [post-harvest crop] residue in a continuous process," Maj. Op. at 1046, Safe Air in fact vigorously contested this assertion. For example, Dr. Meints, an expert for Safe Air, submitted a declaration stating that fire is *not* necessary to produce bluegrass seed:

> The primary purpose of burning bluegrass straw is to remove the excess post-harvest crop residue from bluegrass fields. Fire is not necessary to physiologically shock or stimulate bluegrass to produce seed or increase seed yield. Fire is an inexpensive way for the [G]rowers to remove post-harvest crop residue from the field and remove grass straw from the crown of the plant.... Farmers in Washington [for example] have successfully grown and harvested bluegrass seed on tens of thousands of acres without open field burning.

Similarly, Art Krenzel, another expert for Safe Air, submitted a declaration explaining that fire is not necessary to produce bluegrass seed:

> For years, it was an unchallenged tenet in the Kentucky bluegrass industry that fire is necessary to physiologically shock or stimulate the bluegrass plant to produce seed or maintain seed

majority's approach, I would reverse the district court's judgment in favor of the Growers because there exists a genuine dispute as to material facts. *See, e.g.*, *United States v. City of Tacoma*, 332 F.3d 574, 578 (9th Cir.2003) (noting that summary judgment is not proper if there is a genuine dispute as to any material fact).

III.

Because I would remand for further proceedings, I briefly address the question the majority has not decided: whether the burning of the post-harvest crop residue constitutes "the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment...." 42 U.S.C. § 6972(a)(1)(B).

"Disposal" is defined in RCRA to include the "deposit ... or placing of solid waste ... into or on any land ... so that such solid waste ... or any constituent thereof may enter the environment or be emitted into the air...." 42 U.S.C. § 6903(3) (1995). Here, the burning of the post-harvest crop residue clearly results in smoke and emits particles into the air, and such emissions only occur as a result of the Growers' actions--that is, by setting fire to the fields. Thus, I would hold that the burning of the post-harvest crop residue constitutes "disposal" of that waste under RCRA.

In the alternative, I also would hold that burning the fields to remove the post-harvest crop residue constitutes "treatment" or "handling" of solid waste

---

yields. Both [u]niversity and private research in Kentucky bluegrass seed production have soundly proved this concept is incorrect, repeatedly.... Bluegrass farmers use fire to remove the grass straw because it is a cheap way to dispose of unwanted bluegrass crop residue so that the plants will receive sufficient sunlight, moisture, and space to produce a good seed crop the following year.

under § 6972(a)(1)(B). RCRA does not define "treatment" or "handling" in the context of solid waste, and thus, once again, I look to the ordinary meaning of these terms.[10] *See Wilderness Soc'y*, 353 F.3d at 1060. The ordinary meaning of "treatment" is "the action or manner of treating;" "treat" is further defined as "to handle, manage, or otherwise deal with ... to subject to some action (as of a chemical reagent) ... to subject (as a natural or manufactured article) to some process to improve the appearance, taste usefulness, or some other quality." *Webster's Third New International Dictionary* 2434-5 (1993). Thus, even if the Growers burned the waste solely to improve its usefulness--such as converting it into fertilizer--their actions would still constitute "treatment" of that waste.

Similarly, the burning of the post-harvest crop residue constitutes "handling" of that waste. The ordinary meaning of "handle" is: "to deal with; act upon; dispose of; perform some function with regard to." *Id.* at 1027. Again, the Growers' burning of the post-harvest crop residue fits within this definition.

The definitions of these terms--"solid waste," "disposal," "treatment," and "handling"--together with the undisputed facts regarding the need to remove the post-harvest crop residue, make it apparent that RCRA applies to the burning of the post-harvest crop residue. Accordingly, I would hold that the Growers' practice of burning the post-harvest crop residue after the bluegrass harvest constitutes "handling" or "treatment" of "solid waste" within the meaning of § 6972(a)(1)(B). For all the reasons above, I would reverse the district court's judgment in favor of the Growers and remand for trial.

---

[10] RCRA does define "treatment" in the context of 42 U.S.C. § 6928(d)(2)(A), which refers specifically to the "treatment, storage or disposal of" hazardous waste: "The term 'treatment' ... means any method ... designed to change ... the character or composition of any hazardous waste ... so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume." 42 U.S.C. § 6903(34).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SAFE AIR FOR EVERYONE

v.

WAYNE MEYER, et al.,

Case No. CV-02-241-N-EJL

ORDER

Pending before the Court in the above-entitled matter is the Plaintiffs' motion for preliminary injunction.[1] Plaintiffs seek an injunction restricting the Defendants' from burning residue on their fields during the upcoming "burn season."[2] Plaintiffs' complaint also raises a federal nuisance claim. Defendants opposed the motion on several grounds and have filed a motion to dismiss, which is also pending before the Court.

---

[1] The Plaintiffs are an organized group of approximately 1,000 citizens in northern Idaho, Washington, and Montana collectively known as Safe Air For Everyone (hereinafter "SAFE").

[2] The Defendants are a group of seventy-five named individuals who raise Kentucky Bluegrass on the Rathdrum Prairie and/or the Coeur d'Alene Tribal Reservation; both areas in northern Idaho. Applicable to the motion for preliminary injunction are forty-seven of these Defendants who have been titled "Class A" Defendants.

Defendants' motion to dismiss asserts the Plaintiffs have failed to state a cause of action upon which relief can be granted and that this Court lacks subject matter jurisdiction over the Plaintiffs' nuisance claim. The matter has been fully briefed and heard by the Court and is now ripe for consideration.

Applicable Standards

The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Dollar Rent a Car v. Travelers Indem., 774 F.2d 1371, 1374 (9th Cir. 1985) (citation omitted). More recently, the Ninth Circuit has developed an alternative test for granting a preliminary injunction which requires the court to balance the movant's likelihood of success on the merits against the relative hardship to the parties. See Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999); Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1118 (9th Cir. 1999). Thus, in this circuit a party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of the hardships tips in its favor. Textile Unlimited, Inc. v. BMH Co., Inc., 240 F.3d 781 (9th Cir. 2001); see also Tillamook County v. United States Army Corps of Engineers, 288 F.3d 1140, 1142 (9th Cir. 2002). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. Id. Regardless of the criteria employed, whenever the public interest is involved, it must be a necessary factor in the Court's consideration of whether to grant preliminary injunctive relief. Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

A motion to dismiss should he granted where the plaintiff fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12. "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v. Cable News Network, Inc., 284 F.3d 977 (9th Cir. 2002) (citing Raban v. INS, 35 F.3d 1449, 1451 (9th Cir. 1994) (citing Buckey v. County of Los Angeles, 968 F.2d 791, 793-94 (9th Cir. 1992)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." American Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002) (citing Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)).

Analysis

Plaintiffs' complaint and motion for preliminary injunction have been brought before this Court based upon a federal statute, the Resource Conservation and Recovery Act (hereinafter "RCRA"), 42 U.S.C. § 6901 et seq. Plaintiffs assert jurisdiction is proper under RCRA pursuant to 42 U.S.C. § 6972(a) because an endangerment to public health has occurred and will reoccur within the District of Idaho. (Docket No. 1, p. 3). Based on the following the Court finds it is without proper jurisdiction in this matter and, therefore, Defendants' motion to dismiss should be granted and the case dismissed in its entirety. Accordingly, the Court will not address the motion for preliminary injunction because the Court's ruling on the motion to dismiss renders the same moot.

1) RCRA Claim:

RCRA governs the handling of both hazardous and nonhazardous solid wastes. Ashoff v. City of Ukiah, 130 F.3d 409, 410 (9th Cir. 1997). Citizens are allowed to initiate a lawsuit to enforce the requirements of RCRA in certain situations. 42 U.S.C. § 6972. Since there has been no evidence of a violation in this case, the only applicable provision allowing for a "citizen suit" which Plaintiffs may invoke is § 6972(a)(1)(B) which states:

> [any person may commence a civil action on his own behalf] against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;

(emphasis added). Plaintiffs assert the burning of Kentucky Bluegrass field residue is a disposal of solid waste presenting an imminent and substantial endangerment to health or the environment. Defendants contend the burning is neither a "disposal" nor a "solid waste" and, therefore, RCRA does not apply. Plaintiffs argue the determination of whether the burning in this case is a "disposal" or a "solid waste" is a factual determination that is not proper for the Court to make at this time. The Court respectfully disagrees.

In order to ascertain whether jurisdiction is proper, the Court must interpret the statute in order to determine its applicability to the issues presented in this matter. Interpretation of a statute to determine its applicability to a lawsuit and whether a court possesses jurisdiction are questions of law. In re Cardelucci, 285 F.3d 1231 (9th Cir. 2002) (citing In re Celebrity Home Entertainment, Inc., 210 F.3d 995, 997 (9th Cir. 2000)). The existence of subject matter jurisdiction is a question of law. United States v. Peninsula Communications, Inc., 287 F.3d 832 (9th Cir. 2002) (citing Harden v. Roadway Package Sys., Inc., 249 F.3d 1137, 1140 (9th Cir. 2001)).

Statutory interpretation begins with the language of the statute. Children's Hosp. and Health Center v. Belshe, 188 F.3d 1090 (9th Cir. 1999) (citing United States v. Ron Enters., Inc., 489 U.S. 235, 241 (1989)). When the plain meaning of a statutory provision is unambiguous, that meaning is controlling. Id.; see also United States v. Partlow, 159 R3d 1218, 1219 (9th Cir. 1998). To determine the plain meaning of a statutory provision, the Court must examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy. Id. (citing Green v. Commissioner, 707 F.2d 404, 405 (9th Cir. 1983). If ambiguity exists, the Court may use legislative history as an aid to interpretation. Id. (citing Green 707 F.2d at 405; Mount Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1453 (9th Cir. 1992)).

When Congress enacted the RCRA and its subsequent amendments, it created a complex response to the problems involved in safely disposing of solid waste. Greenpeace, Inc. v. Waste Technologies Industries, 9 F.3d 1174 (6th Cir. 1993). When confronted with such a complex statutory scheme, a court cannot discern congressional intent by reading an isolated subsection such as § 6972(a)(l)(B) without reference to other related provisions. Id. The court "must interpret the statute as a whole, making every effort not to

interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous." Id. at 1179 (citing Lake Cumberland Trust, Inc. v. United States Environmental Protection Agency, 954 F.2d 1218, 1222 (6th Cir. 1992) (citing Boise Cascade Corp. v. United States Environmental Protection Agency, 942 F.2d 1427, 1432 (9th Cir. 1991)).

a) "Disposal" and "Solid Waste":

At issue in this case are the meanings of "disposal" and "solid waste" as contemplated by Congress in promulgating RCRA. In considering the text of the statute as a whole, the Court finds the language in RCRA is unambiguous. See American Mining Congress v. United States E.P.A., 824 F.2d 1177, 1190 (D.C. Cir. 1987) (the statutory language of RCRA is unambiguous). Therefore, the plain meaning of the terms viewed in light of the statute as a whole controls the Court's interpretation of RCRA. See Greenpeace, Inc., 9 F.3d at 1179.

The terms "disposal" and "solid waste" are defined in RCRA, 42 U.S.C. § 6903(3) and (27). "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid liquid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). "Solid waste" is defined as "any garbage, refuse, sludge . . . and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . ." 42 U.S.C. § 6903(27). These definitions are broad and may encompass a wide range of activities and materials. However, in viewing these definitions in the context of the entire statutory scheme of RCRA, it becomes clear that the burning of the residue in this case was not meant to fall within the

definitions of "disposal" or "solid waste."

The burning is not a "disposal." RCRA was promulgated to "reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4). In addressing the problem of amassing amounts of solid waste, Congress sought to protect the public health and the environment and to conserve valuable materials and energy resources. 42 U.S.C. § 6902(a). The burning of the residue by the farmers in this case is not the kind of "disposal" RCRA was created to remedy. Even if the burning were considered a "disposal," the Plaintiffs' complaint does not seek a remedy as to the act of burning itself. Instead, Plaintiffs seek relief from the smoke created from the burning. This type of relief, by its very nature, invokes concerns under the Clean Air Act (hereinafter "CAA") which was promulgated specifically to address air quality concerns. See 42 U.S .C. § 7400 et seq. RCRA, on the other hand, was established to remedy the problems surrounding the increasing amounts of solid waste by regulating methods for disposal of the waste.

The crux of this case turns on whether the residue is a "solid waste." The evidence presented in this case establishes that residue is not a "solid waste" as contemplated by RCRA. In applying the plain meaning of the terms used by RCRA in defining "solid waste" as "discarded material," it is clear that "solid waste" contemplates materials to which the owner or producer no longer attaches value or maintains an interest in possessing. See American Mining, 824 F.2d at 1185 (holding that in defining the term "solid waste," "Congress used the term 'discarded' in its ordinary sense -- 'disposed of' or 'abandoned.'"). While there is a dispute in the testimony concerning the purpose and/or benefits of burning, there was no disagreement that burning the residue serves legitimate purposes beyond mere removal of the residue and, therefore, the residue is extremely valuable to the farmers. Thus, the burning

of the residue is not an abandonment or discarding of the material but, instead, an important part of the growth process).[3] These farmers, who have raised Kentucky Bluegrass for many years, testified that the benefits of burning beyond removal of the residue include: the pot ash left on the field after a burn that contains minerals which, without burning, the farmer would have to replace in the soil by using fertilizers or soil conditioners; an increasing photo-enhancement period; fewer diseases and weeds and, thus, fewer pesticides are required on burned fields; and longer crop rotations (i.e. 8 to 10 years as opposed to 3 to 4 years). Plaintiffs contend the residue is a "solid waste" because the farmers' purpose in burning the residue is to remove it from the fields and, therefore, it is a "discarded material." Plaintiffs point to Washington farmers who continue to raise the crop without burning and assert that any benefits of burning are "incidental" to the farmers' primary purpose for burning-residue removal. At the hearing, Plaintiffs' scientific expert, Dr. Paul Meints, disputed the value and extent to which the benefits of burning asserted by the farmers truly exist. The Idaho legislature, however, has corroborated the Defendants' statements regarding the benefits to burning. Idaho Code § 22-4801 states that "[t]he legislature finds that the current knowledge and technology support the practice of burning crop residue to control disease, weeds, pests, and to enhance crop rotations."

Based on the foregoing and viewing the text of the statute as a whole, the Court finds the burning of the residue is not a "disposal" and, further, the residue is not a "solid waste" because it is neither discarded or abandoned but, instead, used as a part of the growth process. Therefore, RCRA does not apply.

---

[3] These witnesses include Mr. Arthur Schultheis, Mr. Carl Felgenhauer, Mr. Paul Stearns, and Mr. Wayne Meyer. See Hearing Transcript.

b) Legislative History & Code of Federal Regulations:

Although the Court finds the language of RCRA is unambiguous, the Court notes that the legislative history and the Code of Federal Regulations are consistent with the Court's interpretation of the text of the statute. The legislative history reaffirms that RCRA was established to manage the huge volume of solid waste in this country. H.R. Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239 (The purpose of the legislation is to create a "multifaceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year. . . ."). Throughout the legislative history the committee discusses the problems associated with land disposal of discarded material. More importantly, in defining "solid waste" and "discarded material" the committee stated that "agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses. An increase in reclamation and reuse practices is a major objective of the [RCRA]." Id. at 2, U.S.C.C.A.N. at 6240. The committee further identified that "the term discarded materials is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse trash, garbage and sludge . . . [a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this litigation." Id. Thus, the legislative history supports the Court's conclusion that the burning of Kentucky Bluegrass residue is neither a "solid waste" nor "discarded material" within the guise of RCRA.

The Code of Federal Regulations is also instructive as to the term "discarded" as applied to "solid waste." The Code defines "discarded material" as "any material which is," among other things, "abandoned." 40 C.F.R. § 261.2(a)(2)(l); see also Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). The regulations further

provide that materials constitute "solid waste" if they are abandoned by virtue of being "[d]isposed of." See 40 C.F.R. § 261.2(b)(l). The court in Zands, ultimately defined solid waste as "any discarded material," but noted that even this broad definition does not include materials that are still useful products or material retained for immediate reuse. Id. at 1262.

c) State Legislature's Policy:

Plaintiffs offered substantial evidence regarding the decision by the state of Washington legislature establishing a policy which bans the burning of Kentucky Bluegrass residue except in extreme cases.[4] While this evidence is relevant to the balancing of the competing interests in this case, it does not establish that RCRA applies to the facts in this case. Further, the fact that the policies of Washington and Idaho are inconsistent does not give this Court jurisdiction upon which to decide this matter.[5] The evidence does, however, highlight the fact that the Idaho state legislature has established a policy opposite of Washington and determined that agriculture burning is an important state interest and that burning is an "essential tool" to farming that will continue to be used

---

[4] In the summer of 1995 the state of Washington began investigating possible alternatives to burning Kentucky Bluegrass. in the spring of 1996 through the spring of 1998, Washington's Department of Ecology established new regulations banning burning, except in certain cases, and certifying alternatives to burning.

[5] In the context of the nuisance claim Plaintiffs contend they are without a state remedy and this matter is more appropriately decided with federal law because the affects of the smoke cross state lines. However, this is not the type of interstate dispute requiring federal intervention into state law matters. See National Audubon Society, et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988).

in the state of Idaho. Idaho Code § 22-4801 and IDAPA 02.06.16.012.

Based on these findings, the state of Idaho set regulations that "will allow Idaho farmers to maintain the essential tool of fire, while minimizing the impact on the citizens of Idaho of smoke generated by crop residue burning." IDAPA 02.06.16.012. Specifically, the state of Idaho's Department of Agriculture and Department of Environmental Quality have established a smoke management policy to effectuate the legislative intent. See Idaho Code § 22-4803. Further, the Idaho legislature still requires the enforcement of the state's environmental protection and health act (Idaho Code, Title 39, Chapter 1) and the rules therein as they relate to air quality and the state and national ambient air quality standards, Idaho Code § 22-4801.

Thus, the legislature of the state of Idaho has balanced the competing interests on the issues now raised in this Court and determined the that crop residue burning is an important agricultural interest that will continue in the state of Idaho. Plaintiffs invite the Court to be pro-active and establish the legislature's policy for the state of Idaho. The Court respectfully declines to do so. The remedy, if any, lies with Congress or the state legislature - not the courts.

d) Remedy:

Congress has established methods of enforcement for the protection o f the public health both in RCRA and the CAA. The remedy sought by the Plaintiffs, however, is more appropriately sought under the provisions of the CAA and/or may very well require a change in policy by the legislative branch of government. See 42 U.S.C. § 7470. The Court recognizes the limited nature of raising a citizen suit pursuant to CAA but Congress, not the courts, has delineated a statutory framework within which Plaintiffs must operate. See 42 U.S.C. § 7604(a) (citizen suits allowed to bring suit for violations of

standards or failure to obtain a permit); see also 42 U.S.C. § 7604(a)(2) (allowing citizen suits against the Administrator for allegedly failing to perform any nondiscrctionary act or duty). The evidence here clearly establishes that the national ambient air quality standards have not been violated by the burning of grass residue in previous years and so Plaintiffs may be unable to bring a suit under the CAA and, it appears, the EPA has not acted arbitrarily in declining to do so.[6]

Plaintiffs argue RCRA and the CAA can be reconciled and that to permit citizens suits on matters involving air pollution is not in derogation of an area specifically reserved by Congress to the EPA. The Court respectfully disagrees. While it is true that the Ninth Circuit has not determined that Congress has preempted this field, this does not resolve the fact that RCRA simply does not apply to the facts of this case. See discussion *infra*; see also National Audubon Society. et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988). RCRA by its very nature is designed to address areas that are more site specific (i.e. landfills and waste disposal facilities) where the CAA is designed to address air quality in a broader sense, which is what Plaintiffs seek to remedy in this case.[7] To allow citizens

---

[6] Plaintiffs have offered evidence that although the EPA air quality standards have not been violated, recent scientific research has determined the standards nay not adequately protect the public's health. If this is the case, the solution to this disparity lies with Congress not with the courts.

[7] Plaintiffs may argue the pollution in this case is site specific to the farms who initiate the burning, however, the evidence failed to establish any link to any specific farm. The Plaintiffs have attempted to couch their claim to fit within RCRA, however, the core of Plaintiffs' complaint seeks a broader resolution than contemplated by RCRA - clean air in northern ldaho - which necessarily implies that Plaintiffs' allegations should be sought under the CAA. Further, in setting the annual 24-hour standard for

suits every time someone disagrees with the air environment would be chaotic, unmanageable, and unduly burdensome on the court system. In this case alone there were approximately 1,800 phone calls made to the state's hotline complaining about the smoke in one burning season. Further, the research and in-depth analysis necessary to address and resolve the concerns presented by these issues can and should only be undertaken by Congress and administrative bodies better suited for such a task.

e) Conclusion:

The Court finds the burning of Kentucky Bluegrass residue is not a "disposal" of "solid waste" as contemplated by RCRA and, therefore RCRA does not apply nor was it intended to apply to the facts presented in this case. This Court, therefore, is without jurisdiction in this matter and Defendants' motion to dismiss as to the Plaintiffs' RCRA claim must be granted. While the Court concludes it is without jurisdiction in this matter, the Court 'is not finding the smoke is not a pollutant or a

---

particulates, specifically PM2.5, the EPA has directly addressed the concerns raised by Plaintiffs regarding short intense exposure to particulate matter by sensitive individuals. See National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,677 (July 18, 1997) (to be codified 40 C.F.R. pt. 50) ("In the Administrator' s judgment, the factors discussed above provide ample reason to believe that both annual and 24-hour PM 2.5 standards are appropriate to protect public health from adverse health effects associated with short- and long-term exposures to fine particles."). Moreover, it appears the EPA, pursuant to CAA, is continuing to research and revise the national Ambient Air Quality Standards for Particulate Matter. See e.g. Review of the National Ambient Air Quality Standards for Particulate Matter 66 Fed. Reg. 61,268, 61,275 December 3, 2001) (the review of the NAAQS was scheduled to be completed by July, 2002 but this date has been pushed back into 2003).

cause of the health problems confronting the citizens in the affected areas.

2) Federal Common Law Nuisance:

Plaintiffs' nuisance claim asserts "Defendants' burning of grass field residue creates an unreasonable interference with the rights of the general public to life, to safe and breathable air, and to be safe in their homes, schools, workplaces, and communities without the threat and harm to health of invasive and noxious smoke and pollution." (Docket No. 1, p. 27). Plaintiffs ask this Court to "enjoin any future burning of grass field residue by Defendants." (Docket No. 1, p. 28). Defendants assert Plaintiffs' nuisance claim should be dismissed because Congress has spoken with particularity to the issues raised in Plaintiffs' complaint in both RCRA and the CA.A. (Docket No. 20, pp. 2, 12-19). Plaintiffs contend it is necessary for this Court to entertain the nuisance claim because the Plaintiffs are without an adequate state remedy and that the controversy's interstate nature makes state law inappropriate."[8]

---

[8] Plaintiffs are citizens of Idaho and Washington. Their claims also involve potentially harmful affects in Montana and Canada. The Court acknowledges that the Idaho Supreme Court recently determined that Idaho's long-arm statute provided personal jurisdiction over an out-of-state farming corporation's grass burning that allegedly injured an Idaho citizen in Idaho. McAnally v. Bonjac, Inc., 2002 WL 1419594 (Idaho) (Unpublished and subject to revision at this time). However, Plaintiffs may be precluded from raising a nuisance claim in state court. The Right to Farm Act codified in Idaho Code Title 22, Chapter 45 seeks to reduce the loss of agricultural operations by limiting the circumstances whereby the operations may be deemed a nuisance. Idaho Code § 22-4501. The statute protects existing agricultural operations from being declared a nuisance so long as the operation is not improper or negligent. Idaho Code § 22-4503. The statute prevents the

Nuisance is a common law claim alleging an interference with one's use or enjoyment of their property. BLACK'S LAW DICTIONARY (7th Ed. 1999). "In a federal common law nuisance action, the court is asked to determine whether an act or omission causes damage to the public." National Audubon Society, et al. v. Department of Water, et al., 869 F.2d 1196 (9th Cir. 1988). There is no *general* federal common law. Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. Id. at p. 1200 (quoting Milwaukee v. Illinois, 451 U.S. 304, 312 (1981)). "[I]t is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law." Id. (citing Milwaukee at 317). The federal common law nuisance claims cannot escape preemption if Congress has "occupied the field . . . through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." Id. Federal common law may be fashioned only where "a federal rule of decision is 'necessary to protect uniquely federal interests'" or an area where "Congress has given the courts the power to develop substantive law." Id. (citations omitted).

While the case law has not determined that Congress has preempted courts from applying federal common law, it is clear that Congress has not given courts the power to develop substantive law in this area. The Ninth Circuit determined that the comprehensive nature of the CAA gives no indication that Congress intended to rely on a body of federal common law to remedy air pollution. See National Audubon Soc., 869 F.2d at 1201 (holding the plaintiff could not properly

---

adoption of ordinances or resolutions declaring as a nuisance any agricultural operations operated in accordance with generally recognized agricultural practices. Idaho Code § 22-4504. This state law question, however, is not before the Court and will not be decided here.

assert a federal common law nuisance action based on air pollution but declining to decide whether or not such a cause of action would he preempted by the CAA).

The case at bar presents neither a uniquely federal interest nor an interstate dispute. Therefore, Plaintiffs in this case cannot properly assert a federal common law nuisance action based on air pollution. See National Audubon Soc., 869 F.2d at 1201; see also Save Our Summers v. Washington State Dept. of Ecology, 132 F. Supp. 2d 896 (E.D. Wa. 2000). This case presents questions concerning predominately state policies and interests. Although Plaintiffs contend federal law should control because the effects of the burning cross state lines and affect citizens of different states, this is not the kind of "interstate dispute . . . requiring resolution under federal law. . . ." National Audubon Society, 869 F.2d at 1205 (recognizing that the "[Supreme] Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be inappropriate for state law to control, and therefore subject to resolution according to federal common law."). Moreover, even the fact that Idaho and Washington maintain essentially conflicting policies regarding burning does not rise to the level of an interstate dispute requiring federal resolution. Id.

Based on the foregoing the Court finds the Plaintiffs' nuisance claim seeking to invoke federal common law must also be dismissed. The Court further notes that this ruling does not leave the Plaintiffs without any remedy, the remedy sought by Plaintiffs simply must be achieved through the proper channels whether that be the CAA, through the EPA, or pursuing changes through legislative means.

ORDER

Based on the foregoing and being fully advised in the premises, the Court HEREBY ORDERS as follows:

1) Defendants' Motion to Dismiss is **GRANTED** and the case is **DISMISSED IN ITS ENTIRETY**.

2) Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Exclude Expert Witnesses are **DENIED AS MOOT**.

IT IS SO ORDERED this [19th day] of July, 2002.

EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAFE AIR FOR EVERYONE, Plaintiff-Appellant

v.

WAYNE MEYER, et al., Defendants-Appellees
No. 02-35751
Order

Before: WARDLAW, GOULD, and PAEZ, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Bane. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

Filed October 5, 2004

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Resource Conservation and Recovery Act

Section 1004 [42 U.S.C. § 6903]

Definitions

* * *

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * * * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

* * * * *

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

* * * * *

(34) The term "treatment," when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

* * * * *

Section 7002 [42 U.S.C. § § 6972]

Citizen suits

(a) In general. Except as provided in subsection (b) or (c)

of this section, any person may commence a civil action on his own behalf--

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is

contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 3008(a) and (g).

(b) Actions prohibited.

(1) No action may be commenced under subsection (a)(1)(A) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation to--

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.
In any action under subsection (a)(1)(A) in a court of the United States, any person may intervene as a matter of right.

(2) (A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to--

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B), except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under section 7003 of this Act or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act; or (iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [1980] or section

7003 of this Act pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.
In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B);

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 and is diligently proceeding with a remedial action under that Act.

(D) No action may be commenced under subsection (a)(1)(B) by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter,

impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice. No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subtitle C of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this Act may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention. In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs. The court, in issuing any final order in any action brought pursuant to this section or section 7006 may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek

enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters. A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

****

Excerpts from Transcript of
Preliminary Injunction Hearing (July 10-11, 2002)

Testimony of Donald W. Jacklin

Direct Examination

Questions by Mr. HcHugh [Co-Counsel for Plaintiff]

* * * * *

Q. Are you familiar then, based on your work with Jacklin Seed, as to the reason for burning grass field residue?

A. Yes, I am. Basically we burned our fields and other farmers burned their fields for the primary purpose of a photo induction for increased seed yield.

Q. With regards to that, is that the primary purpose.

A. That is the primary purpose.

Q. Can you put a percentage on that? How high of percent of that is the reason why?

A. If I were to say what is the major reason I burned, 99.9 percent of it is for burning for a photo period or a photo induction enhancement of seed yield.

Q. Describe what the photo induction period is.

A. A photo induction period, I guess I can best describe as comparing it in comparing an Easter lilly. If you have an Easter lilly and you give it a certain day length, it be be vegetative or just leaf up until a certain period of time. As it gets closer to Easter, you increase the daylight and it receives a photo induction period and it flowers. So it has a reproductive part to it.

That is essentially what happens with all plants that do flower and Kentucky bluegrass is the same scenario. So those new green tillers that emerge following a burn are subjected to sunlight. If they don't get sunlight, they are going to be very vegetative, which the homeowner wants vegetation, he doesn't want seed production. So the farmer's trick is to convince that plant, if you will, through their practices to go reproductive instead of vegetative.

By burning in the fall, it rids the surface and the canopy so we have a bare soil. The new tillers or new tissue comes up, receives sunlight and basically creates a photo period that tells the plant be reproductive this next year rather than vegetative.

And you can actually go in then in December, January and February, dissect those little shoot tissues and a seed head primordia, or in normal terms, a seed head fetus and it will be reproductive or vegetative based on the amount of sunlight exposure you receive in the fall.

Q. How important is it to remove the residue quickly after harvest?

A. Extremely important. It needs to come off as soon as possible and obviously as much as possible.

*****

June 3, 2002, Declaration of Arthur Long, Exhibit F